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A GREEN BIRD IN THE HAND: AN EXAMPLE OF ENVIRONMENTAL REGULATIONS OPERATING TO STIFLE ENVIRONMENTALLY CONSCIOUS INDUSTRY

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Abstract: In the past, there was a constant strain between industry and the United States Environmental Protection Agency (EPA). Industry, with its relentless pursuit of profitability, would spare no expense—environment included—to achieve its objectives. EPA, on the other hand, often levied hefty fines on industry in order to ensure compliance with environmental regulations. In recent years, however, many companies have taken a more proactive approach toward environmental compliance. While some companies use an image of environmental responsibility only in their marketing campaigns, others have realized that it is cheaper to take preventive action than be forced to pay for remediation. The new paradigm of environmental law recognizes that industry makes a better partner than adversary. This Note discusses the attempts of Texas Instruments, Inc. to transfer ownership of a state-of-the-art waste water treatment plant to an industrial redevelopment company. The plan would create an industrial park, create hundreds of jobs, and allow small industrial companies to discharge their hazardous waste to an on-site facility at a greatly reduced cost. However, because of a narrow reading of the exceptions to the extensive permitting requirements of the Resource, Conservation, and Recovery Act (RCRA), the plant is currently unable to treat hazardous waste. This Note examines several of the relevant RCRA exceptions and argues that it benefits all parties for this plant to operate at full capacity.

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INTRODUCTION

Texas Instruments, Inc. (TI) calls itself the “world leader in digital signal processing and analog technologies, the semiconductor engines of the Internet age.”¹ The company is headquartered in Dallas, Texas, and has manufacturing, design, and sales operations in more than twenty-five countries.² In 1959, TI acquired the Metals & Controls Corporation in Attleboro, Massachusetts, which later became Sensors & Controls.³ Sensors & Controls makes custom engineered, application-specific sensors and controls for automotive, heating, ventilation, and air-conditioning products.⁴ The site at Attleboro served as one of TI’s manufacturing campuses for decades, and in 1997 it occupied fifteen buildings with 1.4 million square feet of space.⁵ The site was fitted with a hazardous wastewater treatment plant (WWTP), public utilities, and a freight-rail spur.⁶ The future of this WWTP is the focus of this Note.

Because TI owned and operated all of the buildings in the Attleboro manufacturing campus, it was able to avoid regulation under Massachusetts’s implementation of the Resource, Conservation, and Recovery Act (RCRA) for the operation of its hazardous WWTP.⁷ RCRA is the

¹ Texas Instruments Company Info, http://www.ti.com/corp/docs/company/index.htm?DCMP=TIHomeTracking&HQS=Other+OT+home_f_company (last visited Mar. 27, 2007).

² Texas Instruments Fact Sheet, <http://www.ti.com/corp/docs/company/factsheet.shtml> (last visited Mar. 27, 2007).

³ Sensors & Controls Fact Sheet, <http://www.ti.com/corp/docs/press/company/2006/s-factsheet.shtml> (last visited Mar. 27, 2007). Interestingly, the Metals & Controls Corp. had used radioactive materials in its operations, and TI was responsible for cleaning the site. See Letter from L. Joseph Callan, Executive Dir. for Operations, to Comm’rs, U.S. Nuclear Regulatory Comm’n (Mar. 13, 1997) (on file with author) (regarding removal of TI from site decommissioning management plan).

⁴ Sensors & Controls Fact Sheet, <http://www.ti.com/corp/docs/press/company/2006/s-factsheet.shtml> (last visited Mar. 27, 2007). In April 2006, the private investment firm Bain Capital, LLC purchased Sensors & Controls—now Sensata Technologies—from TI for \$3 billion. Steven Syre, *Bain Capital Completes Its Acquisition of Sensata*, BOSTON GLOBE, Apr. 28, 2006, at E2.

⁵ Susan Diesenhouse, *Contraction Gives Way to Expansion as Texas Instruments Consolidates Its Shrinking Attleboro Operations, Space Opens Up for Smaller Companies and Housing*, BOSTON GLOBE, May 7, 2005, at E8 [hereinafter *TI Consolidates Its Shrinking Attleboro Operations*].

⁶ *Id.*

⁷ See MASS. GEN. LAWS ch. 21C, §§ 1–30 (2002); Letter from Christopher Tilden, Reg’l Eng’r for Waste Prevention, Mass. Dep’t of Env’tl. Prot., to Francis J. Veale, Jr., Env’tl., Safety & Health Manager, Texas Instruments (Sept. 30, 2004) (on file with author) [hereinafter Sept. 30 Letter from DEP]; see also Letter from Gary S. Morgan, Reg’l Dir., Mass. Dep’t of Env’tl. Prot., to Francis J. Veale, Jr., Env’tl., Safety & Health Manager, Texas Instruments (June 29, 2005) (on file with author) [hereinafter Notice of Noncompliance].

principle federal statute regulating the generation, transportation, storage, and treatment of solid waste.⁸ Instead, TI operated its WWTP pursuant to an Industrial User Permit issued by the City of Attleboro.⁹ This permit was issued to TI as the result of Massachusetts's implementation of the Clean Water Act (CWA).¹⁰ Accordingly, the wastewater unit exemption allowed TI to avoid any further regulation under RCRA.¹¹

In 2005, however, TI announced plans to consolidate its Attleboro operations.¹² TI sold the land to Preferred Real Estate, Inc. (PREI)—a developer specializing in reusing industrial properties—and leased from PREI just two of fifteen buildings it once occupied.¹³ PREI then sought primarily smaller business tenants to fill the vacant buildings.¹⁴ The state of the art hazardous WWTP would serve to benefit both the smaller companies who could not afford typical hazardous waste treatment, and PREI, who should have had an easy time filling the empty buildings.¹⁵ The development of the Attleboro Corporate Campus was also aimed at providing needed jobs to Attleboro's high-skilled workforce.¹⁶ However, the Massachusetts Department of Environmental Protection (DEP) and the U.S. Environmental Protection Agency (EPA) intervened.¹⁷ Because TI no longer owned all of the property at the Attleboro site, the WWTP had to comply with all RCRA regulations to treat hazardous waste, which differed significantly from the Industrial User Permit under which it had previously operated.¹⁸

This Note will analyze whether it is possible to avoid a lengthy and expensive re-permitting process to treat hazardous waste when control of a WWTP changes ownership.¹⁹ It will also analyze the effect of PREI's

⁸ See 42 U.S.C. § 6903 (2003).

⁹ See 314 MASS. CODE REGS. 7.13 (2006) (describing Massachusetts sewer system extension and connection permit process).

¹⁰ See generally MASS. GEN. LAWS ch. 21, §§ 26–53; 314 MASS. CODE REGS. 7.00–.13 (implementing the federal CWA in Massachusetts).

¹¹ See discussion *infra* Part II.B.3.

¹² *TI Consolidates Its Shrinking Attleboro Operations*, *supra* note 5.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*; see Letter from Francis J. Veale, Jr., Envtl., Safety & Health Manager, Texas Instruments, to Christopher Tilden, Reg'l Eng'r, Mass. Dep't of Envtl. Prot. (Sept. 28, 2004) (on file with author) [hereinafter Sept. 28 Letter from TI].

¹⁶ *TI Consolidates Its Shrinking Attleboro Operations*, *supra* note 5.

¹⁷ See Notice of Noncompliance, *supra* note 7.

¹⁸ See Sept. 30 Letter from DEP, *supra* note 7.

¹⁹ See discussion *infra* Part IV. The plant has the ability to treat hazardous and nonhazardous wastewater, recycle water, manage solid hazardous waste, and provide high-purity water to other tenants on the site. Brad Kelly, *South Shore Entrepreneur*; *Love That Dirty Water*; *Wastewater Treatment Plant Fills a Need*, PATRIOT LEDGER (Quincy, MA), May 29, 2006, at 9. It

plan to have multiple companies discharge hazardous waste to the WWTP, and the DEP's decision to not grant a section 307(b) pretreatment permit under the CWA, which appears to require a stricter interpretation of the Act than EPA has given.²⁰ Part I provides a brief history of the Attleboro campus and the debate over the WWTP permitting process. Part II discusses the federal law under RCRA and the wastewater treatment exemption. Part III examines the CWA and pretreatment permits for the introduction of pollutants into treatment works that are publicly owned. Part IV analyzes potential solutions to avoid decommissioning the plant under RCRA, and Part V identifies how section 307(b) can operate to regulate the plant under the CWA.

I. HISTORY OF THE ATTLEBORO CORPORATE CAMPUS

For the last few decades, Texas Instruments has used an industrial park in Attleboro, Massachusetts, as one of its primary manufacturing campuses.²¹ The park has over fifteen buildings on 264 acres and is outfitted with a state of the art wastewater treatment plant, public utilities, and a freight-rail spur.²² Since 1997, TI has moved much of its manufacturing abroad.²³ As TI gradually moved its operations offshore, its WWTP no longer received sufficient wastewater from on-site manufacturing operations to make the plant viable.²⁴ TI hoped to salvage the WWTP and its manufacturing campus by allowing smaller companies to occupy the emptied buildings and help create a new industrial base in Attleboro.²⁵

In late 2004, TI informed the DEP that it would no longer be operating its WWTP.²⁶ In order to avoid decommissioning the facility, TI proposed a redevelopment strategy in which it would sell its land and buildings in Attleboro to PREI who would, in turn, seek business ten-

has the capability to treat one million gallons of water a day, and currently receives wastewater from environmental remediation projects, manufacturing operations, utility plants, construction, and highway projects. *Id.* This Note will focus on the ability of the plant to treat hazardous wastewater.

²⁰ See discussion *infra* Part IV.B.

²¹ *TI Consolidates Its Shrinking Attleboro Operations*, *supra* note 5.

²² *Id.*

²³ *Id.*

²⁴ Sept. 28 Letter from TI, *supra* note 15. Of the fifteen buildings TI once occupied in the industrial park, only two are currently operated by TI. *TI Consolidates Its Shrinking Attleboro Operations*, *supra* note 5, at E8.

²⁵ See Sept. 28 Letter from TI, *supra* note 15; *TI Consolidates Its Shrinking Attleboro Operations*, *supra* note 5.

²⁶ Sept. 28 Letter from TI, *supra* note 15.

ants to occupy the other buildings in the park—now called the Attleboro Corporate Campus.²⁷ In its letter, TI informed the DEP that New-Stream, LLC would operate the WWTP and have full dominion and control over the piping and existing systems that are integral to its operation for the on-site business.²⁸ Furthermore, TI retained a perpetual easement in all of the pipes leading to and from the WWTP from the other buildings on the Campus.²⁹ TI believed that by reserving an easement in the pipes, the WWTP would be considered “on-site”—one of Massachusetts’s requirements to avoid RCRA permitting.³⁰ The letter also informed the DEP that another company, Engineered Materials Solutions, Inc. (EMSI), had a direct discharge to the WWTP.³¹ To accomplish this plan, TI proposed to transfer its Industrial User Permit pursuant to DEP regulations.³²

The DEP and EPA quickly responded.³³ The DEP alerted TI that direct sewer connection permit transfers do not apply to TI’s proposed redevelopment plan.³⁴ Furthermore, the DEP indicated that TI’s arrangement with EMSI “may jeopardize the exemption TI maintains from [Treatment, Storage, and Disposal Facility licensing] insofar as TI is properly licensed . . . to only treat its *own* hazardous waste.”³⁵ According to the DEP, “[d]irect sewer connection permit transfer, in lieu of permit modification or re-permitting is intended to apply only when changing ownership and/or operation from *one single entity to another single entity* for like operations.”³⁶ In its response, EPA analyzed several possible exemptions from Treatment, Storage, and Disposal Facility

²⁷ See *id.*; *TI Consolidates Its Shrinking Attleboro Operations*, *supra* note 5.

²⁸ Sept. 28 Letter from TI, *supra* note 15.

²⁹ Letter from Francis J. Veale, Jr., Envtl., Safety & Health Manager, Texas Instruments, to Christopher Tilden, Reg’l Eng’r, Mass. Dept. of Envtl. Prot. (Oct. 8, 2004) (on file with author) [hereinafter Oct. 8 Letter from TI].

³⁰ *Id.*; See 310 MASS. CODE REGS. 30.010 (2006).

³¹ Sept. 28 Letter from TI, *supra* note 15.

³² *Id.*; see 314 MASS. CODE REGS. 7.13 (2006) (detailing Massachusetts sewer system extension and connection permit transfer process).

³³ Letter from Marv Rosenstein, Chief, Chemical Mgmt. Branch, U.S. Envtl. Prot. Agency, to Steven A. DeGabriele, Dir., Bus. Compliance Div., Bureau of Waste Prevention, Mass. Dept. of Envtl. Prot. (Nov. 17, 2004) (on file with author) [hereinafter Nov. 17 Letter from EPA]; Sept. 30 Letter from DEP, *supra* note 7. For a discussion of administrative agencies’ ability to interpret their own rules flexibly, see generally Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429 (1999).

³⁴ Sept. 30 Letter from DEP, *supra* note 7.

³⁵ *Id.* (emphasis added). See generally 310 MASS. CODE REGS. 30.00 (2006) (detailing hazardous waste treatment procedures in Massachusetts).

³⁶ Sept. 30 Letter from DEP, *supra* note 7 (emphasis added).

(TSDF) licensing.³⁷ Most notably, EPA examined the wastewater treatment unit exemption from RCRA.³⁸ In order for the RCRA exemption to apply, NewStream must apply to Attleboro for a pretreatment permit under section 307(b) of the CWA.³⁹ Furthermore, the DEP sent TI an Administrative Consent Order with Penalty and Notice of Noncompliance for its arrangement with EMSI.⁴⁰ Interestingly, the findings of fact noted that both the nature of the manufacturing operation and the characteristics and volume of the wastewater had not changed materially since the property transfer.⁴¹ However, TI was still fined for violating the terms of its Industrial User Permit.⁴²

II. THE RESOURCE, CONSERVATION, AND RECOVERY ACT (RCRA)

A. *Permitting the Treatment, Storage, and Disposal of Hazardous Waste Under RCRA*

RCRA is the principal federal statute regulating solid wastes.⁴³ The term solid waste is broadly defined as “any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material.”⁴⁴ It uses a comprehensive “cradle-to-grave” system encompassing the generation, transportation, storage, and treatment or disposal of hazardous waste.⁴⁵ For the purposes of this analysis, the focus will be on the treatment, storage, and disposal of hazardous waste.⁴⁶

³⁷ Nov. 17 Letter from EPA, *supra* note 33.

³⁸ 42 U.S.C. § 6924(a) (2000) (outlining the standards applicable to owners and operators of hazardous waste treatment, storage, and disposal facilities).

³⁹ Nov. 17 Letter from EPA, *supra* note 33; *see* 33 U.S.C. § 1317(b) (2000) (outlining the pretreatment standards for wastewater treatment plants); 40 C.F.R. § 403 (2003).

⁴⁰ Notice of Noncompliance, *supra* note 7.

⁴¹ *Id.*

⁴² *Id.*

⁴³ THE LAW OF HAZARDOUS WASTE: MANAGEMENT, CLEANUP, LIABILITY, AND LITIGATION § 1.01 (Susan M. Cooke & Christopher Davis eds., 2005); *see* TOUCHSTONE ENVTL., FEDERAL TOXICS PROGRAM COMMENTARY B1-1 (2005).

⁴⁴ 42 U.S.C. § 6903(27) (2000).

⁴⁵ *See id.*; MASS. CONTINUING LEGAL EDUC., MASSACHUSETTS ENVIRONMENTAL LAW 21-11, (Gregor I. McGregor ed., 2002); ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 845 (3d ed. 2004).

⁴⁶ The relevant statute states:

“[H]azardous waste” means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health

1. Hazardous Waste Treatment, Storage, and Disposal Facilities Under RCRA

In its regulation of wastewater treatment plants (WWTPs), RCRA broadly defines both treatment and disposal.⁴⁷ Hazardous waste treatment, storage, and disposal facilities (TSDFs) attract by far the most attention in the RCRA regulation system.⁴⁸ RCRA requires that TSDFs: (1) maintain records of hazardous waste handled by the facility; (2) report, monitor, and inspect, as well as comply with the manifest system for tracking the movement of hazardous waste; (3) operate and be built in a manner consistent with EPA directives and standards; (4) create a contingency plan for minimizing unanticipated damage from TSDF activities; (5) monitor the site for releases of hazardous waste; and (6) take financial responsibility for corrective action in the event of a release of hazardous materials.⁴⁹ Section 3004(a) of RCRA directs EPA to promulgate regulations that establish performance standards for TSDFs,⁵⁰ and section 3005 outlines how EPA is to issue TSDF permits.⁵¹

There are four primary ways to obtain a RCRA permit to operate a TSDF.⁵² First, anticipating that the process of obtaining a permit would be time consuming, Congress created "interim status"—a designation for a facility that has applied for, but has not yet received, an operating permit.⁵³ Also included in interim status are facilities that were in existence on November 19, 1980.⁵⁴ In 1984, Congress set firm deadlines to

or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5).

⁴⁷ See *id.* § 6903(3) (defining disposal as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste . . . may enter the environment"); *id.* § 6903(34) (defining treatment as "any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous").

⁴⁸ PLATER, *supra* note 45, at 860; MASSACHUSETTS ENVIRONMENTAL LAW, *supra* note 45, at 21-12 to -13; John C. Dernbach, *The Unfocused Regulation of Toxic and Hazardous Pollutants*, 21 HARV. ENVTL. L. REV. 1, 10 (1997) (noting that "[m]ost of RCRA's regulatory apparatus governs the treatment, storage, and disposal of hazardous waste").

⁴⁹ See 42 U.S.C. § 6924(a).

⁵⁰ *Id.*

⁵¹ *Id.* § 6925.

⁵² *Id.*; THE LAW OF HAZARDOUS WASTE, *supra* note 43, § 5.01.

⁵³ THE LAW OF HAZARDOUS WASTE, *supra* note 43, § 5.01; Miriam Feder, *Failures of the Current Waste Management Policy*, 18 ENVTL. L. 671, 675 (1988); see also 42 U.S.C. § 6925(e).

⁵⁴ 42 U.S.C. § 6925(e) (1) (A) (i).

retire all such facilities, the last of which fell due in 1992.⁵⁵ Second, the operator of a TSDF can apply for an individual permit.⁵⁶ At a minimum, this permit must contain estimates with respect to the composition, quantities, and concentrations of any hazardous waste treated, as well as the location of the facility.⁵⁷ Third, a facility can obtain a "permit-by-rule."⁵⁸ A permit-by-rule is available to a TSDF that is regulated by other environmental permit programs such as the CWA.⁵⁹ Under a permit-by-rule program, the facility must meet certain additional mandates pertaining to its hazardous waste management activities.⁶⁰ Finally, the permit requirement can be satisfied by procuring a permit from a state that has been delegated authority to administer the RCRA permit program.⁶¹ Massachusetts, for example, has been delegated authority to issue RCRA permits by EPA, and many of its procedures, requirements, and exemptions parallel the federal RCRA permitting program.⁶² Estimated costs of the permitting process have been in excess of \$1 million and it can take over one year to complete.⁶³

2. TSDF Permitting

Applying for a RCRA permit is a two-phase process.⁶⁴ The first phase requires that the facility provide EPA—or the state delegated agency—basic information about the facility.⁶⁵ With a Part A application, the facility may operate under interim status for a limited period of time.⁶⁶ A Part A permit requires at least the following information: The facility name and address; design and capacity of the facility; types and quantities of hazardous waste managed; description of waste management practices; and drawings or photographs of hazardous waste

⁵⁵ Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221; PLATER, *supra* note 45, at 860, n.16.

⁵⁶ THE LAW OF HAZARDOUS WASTE, *supra* note 43, § 5.01(2).

⁵⁷ 42 U.S.C. § 6925(b).

⁵⁸ THE LAW OF HAZARDOUS WASTE, *supra* note 43, § 5.01(2).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Massachusetts; Final Authorization of State Hazardous Waste Management Program, 50 Fed. Reg. 3344 (Jan. 24, 1985); *see* MASSACHUSETTS ENVIRONMENTAL LAW, *supra* note 45, at 21-9; Nov. 17 Letter from EPA, *supra* note 33.

⁶³ *See* PLATER, *supra* note 45, at 862; Feder, *supra* note 53 at 676-80 (detailing the time and expense of the permitting processing, noting that it "can consume tremendous resources and produce many frustrations").

⁶⁴ TOUCHSTONE ENVTL., *supra* note 43, at B1-11.

⁶⁵ *Id.*

⁶⁶ *Id.*

management activities.⁶⁷ The Part B application expands on this descriptive material.⁶⁸ Additionally required information includes a hazardous waste analysis, tracking, and manifest system; hazardous waste packaging, labeling, and transport provisions; facility standards covering storage and treatment design and operation; contingency plan and emergency response procedures; and groundwater monitoring.⁶⁹

In order to obtain all this data, an applicant typically will hire engineering consultants to prepare the required plans, underlying calculations, and drawings.⁷⁰ EPA regulations contemplate that it takes at least six months to complete Part B of a hazardous waste facility's permit application,⁷¹ but private companies have estimated the process can take up to two years.⁷² After submittal, a facility may still be a long way from obtaining a permit.⁷³ EPA will review the application and return it with notices of deficiency.⁷⁴ Some of these deficiencies can take as long as 90 to 120 days to address.⁷⁵ Finally, after all deficiencies have been corrected, the "draft permit"⁷⁶ must receive public notice and may also be the subject of a public hearing.⁷⁷ When these requirements were first promulgated, they were so cumbersome and disfavored that many existing TSDFs took application filing deadlines as "an invitation to leave the business."⁷⁸ In fact, it appears there is no effective way to currently site a TSDF in Massachusetts.⁷⁹

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Feder, *supra* note 53, at 677.

⁷¹ EPA Administered Permit Programs: The Hazardous Waste Permit Program, 40 C.F.R. § 270.10(e)(4) (2005).

⁷² See Michelle B. Rosenberg, Note, *The Regulation and Permitting of Recycling Research and Development Facilities in the Commonwealth of Massachusetts*, 22 B.C. ENVTL. AFF. L. REV. 819, 846-47 (1995).

⁷³ Feder, *supra* note 53, at 677.

⁷⁴ *Id.*

⁷⁵ *Id.* (noting that "[e]ach series of deficiencies noted by the agency can easily take six months from the time the notice is sent to the applicant").

⁷⁶ *Id.* at 678.

⁷⁷ *Id.*; Specific Procedure Applicable to RCRA Permits, 40 C.F.R. § 124.31-.32 (2005).

⁷⁸ Feder, *supra* note 53, at 680; see MASSACHUSETTS ENVIRONMENTAL LAW, *supra* note 45, at 21-13 ("The Massachusetts siting process proved to be labyrinthine and extraordinarily expensive, and no proposed facility survived the process.").

⁷⁹ MASSACHUSETTS ENVIRONMENTAL LAW, *supra* note 45, at 21-13.

B. *Exemptions to Avoid a RCRA Permit*

In light of the difficulties presented, many facilities seek to avoid the expensive and time consuming process of obtaining a RCRA permit.⁸⁰ Congress and EPA, responding to this problem, have recognized several exemptions from TSDF permitting requirements and standards.⁸¹ Included in these exemptions are facilities that store hazardous waste for generators and transporters,⁸² conditionally exempt small quantity generators,⁸³ and elementary neutralization units.⁸⁴ Most relevant to the present analysis, however, are the exemptions for totally enclosed treatment facilities,⁸⁵ domestic sewage,⁸⁶ and wastewater treatment units.⁸⁷ It is these three exemptions that TI argued applied to its facility, and only these three exemptions are broad enough in scope to possibly cover the facility at the Attleboro Corporate Campus.⁸⁸

1. Totally Enclosed Treatment Facilities

A totally enclosed treatment facility is a “facility for the treatment of hazardous waste which is directly connected to an industrial production process and which is constructed and operated in a manner which prevents the release of any hazardous waste or any constituent thereof into the environment during treatment.”⁸⁹ EPA has interpreted a totally

⁸⁰ See, e.g., Rosenberg, *supra* note 72, at 846–47.

⁸¹ See generally THE LAW OF HAZARDOUS WASTE, *supra* note 43, § 5.02(5) (noting that “[t]hese exemptions cover certain facilities whose activities are regulated by other federal or state regulatory programs that do not present sufficient health or environmental risk to warrant imposition of the full panoply of TSDF requirements”).

⁸² Pre-Transport Requirements, 40 C.F.R. § 262.34(a) (2005) (noting that “a generator may accumulate hazardous waste on-site for 90 days or less without a permit or without having interim status”); *id.* § 263.12(a) (same, except a transporter may only store hazardous waste for ten days or less).

⁸³ *Id.* § 261.5(a) (stating that “a generator is a conditionally exempt small quantity generator in a calendar month if he generates no more than 100 kilograms of hazardous waste in that month”).

⁸⁴ *Id.* § 264.1(g)(6). An elementary neutralization unit is a device which: (1) is used for neutralizing wastes that are hazardous only because they exhibit corrosivity characteristics; and (2) meets the definition of tank, tank system, container, transport vehicle or vessel. *Id.* § 260.10.

⁸⁵ *Id.* § 264.1(g)(5).

⁸⁶ *Id.* § 261.4(a)(1) (excluding “(i) domestic sewage and (ii) any mixture of domestic sewage and other wastes that passes through a sewer system to a publicly-owned treatment works for treatment”).

⁸⁷ *Id.* § 264.1(g)(6).

⁸⁸ See Oct. 8 Letter from TI, *supra* note 29; THE LAW OF HAZARDOUS WASTE, *supra* note 43, § 5.02(5) (explaining exemptions from TSDF permitting requirement).

⁸⁹ 40 C.F.R. § 260.10 (“An example is a pipe in which waste acid is neutralized.”).

enclosed treatment facility as having two defining characteristics.⁹⁰ First, a totally enclosed treatment facility must "not release any hazardous waste or constituent of hazardous waste into the environment during treatment."⁹¹ Second, it "must be directly connected to an industrial production process."⁹² Therefore, while many facilities may be completely on-site using hard piping,⁹³ they may still not be totally enclosed for the purposes of the RCRA exemption.⁹⁴

Massachusetts has been authorized to implement its own state hazardous waste program to operate in lieu of the federal program.⁹⁵ The analogous exemption in Massachusetts is "treatment which is integral to the manufacturing process."⁹⁶ Such treatment is defined in part as any treatment method or technique which is at the site of generation of the waste, is not primarily for the purpose of recycling hazardous waste, and is "(a) [d]irectly connected via pipes or the equivalent from an industrial production process . . . ; and (b) [t]otally enclosed so that it is designed, constructed and operated to prevent spills, leaks or emissions of hazardous materials to the environment."⁹⁷ However, the Massachusetts definition is further limited by an implicit requirement that a facility may maintain an exemption from TSDF licensing only if the facility treats its own hazardous waste.⁹⁸

TI first argued that that its WWTP qualified as a totally enclosed facility.⁹⁹ More specifically, under the Massachusetts requirements, TI argued that it was "treatment which is integral to the manufacturing process."¹⁰⁰ TI believed this to be true because its WWTP is directly connected by pipes to all surrounding buildings and is totally enclosed so as

⁹⁰ Environmental Protection Agency, Rules and Regulations, 55 Fed. Reg. 25,454, 25,467 (June 21, 1990).

⁹¹ *Id.*

⁹² *Id.*

⁹³ See, e.g., Nov. 17 Letter from EPA, *supra* note 33 (noting that all pipes must be interconnected to all outdoor pipes and in turn connected to all treatment tanks).

⁹⁴ 55 Fed. Reg. 25,467 ("Thus, if a facility leaks, spills, or discharges waste or waste constituents, or *emits waste or waste constituents into the air during treatment*, it is not a totally enclosed treatment facility within the meaning of these regulations.") (emphasis added).

⁹⁵ Massachusetts; Final Authorization of State Hazardous Waste Management Program, 50 Fed. Reg. 3344 (Jan. 24, 1985).

⁹⁶ 310 MASS. CODE REGS. 30.501(2)(b) (2005).

⁹⁷ 314 MASS. CODE REGS. 8.03(3)(d) (1993).

⁹⁸ See Sept. 30 Letter from DEP, *supra* note 7 (indicating a unitary ownership requirement).

⁹⁹ Oct. 8 Letter from TI, *supra* note 29.

¹⁰⁰ *Id.*

to prevent spills, leaks, or emissions.¹⁰¹ Furthermore, TI retained ownership of all the utilities and power servicing the property, and thereby retained control of the pumps, valves, and electrical power that controlled individual company wastewater discharges.¹⁰² TI also reserved perpetual easements for the operator of the WWTP in all of the piping and other connections to the WWTP; as such, the entire system is located on geographically contiguous property under common ownership.¹⁰³ Because there is no express regulatory requirement that there be unity of ownership, TI concluded that it was operating a facility that fell within this exemption.¹⁰⁴

However, neither the DEP nor EPA thought that TI's WWTP qualified as a totally enclosed treatment facility.¹⁰⁵ According to EPA, TI's WWTP "has at least some potential for having fugitive or other air emissions."¹⁰⁶ Such emissions were enough for EPA to conclude that "[t]he material submitted by TI falls well short of establishing that the entire proposed operation will be totally enclosed."¹⁰⁷

2. Domestic Sewage Exemption

EPA also briefly analyzed whether the WWTP could operate under the domestic sewage exemption.¹⁰⁸ Domestic sewage is untreated sanitary waste that passes through a sewer system.¹⁰⁹ When first promulgated, commentators believed the domestic sewage exclusion was based on the notion that "an individual POTW [Publicly Owned Treatment Works] is in the best position to determine which industrial discharges it can safely address and still meet the discharge limits placed in its [National Pollutant Discharge Elimination System] NPDES permit."¹¹⁰ However, EPA has taken the position that the domestic sewage exclusion should only apply under limited circumstances, including: (1) where the source and water stream are subject to a categorical pretreatment standard; (2) where the pollutant and source are subject to a

¹⁰¹ *Id.* (noting that "[a]ll of the piping is lined or double-walled and located above-ground for easy inspection").

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*; see 314 MASS. CODE REGS. 8.03(3)(d) (1993).

¹⁰⁵ Nov. 17 Letter from EPA, *supra* note 33; see Sept. 30 Letter from DEP, *supra* note 7.

¹⁰⁶ Nov. 17 Letter from EPA, *supra* note 33.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ 40 C.F.R. § 261.4(a)(1)(ii) (2005).

¹¹⁰ Doris K. Nagel, *The Erosion of Federally Permitted Releases and the Domestic Sewage Exclusion*, 10 VA. ENVTL. L.J. 213, 216 (1991).

technically-based local limit developed by EPA or the state; (3) where the waste is generated in de minimis amounts by a household or similar non-commercial entity; or (4) where the source and waste stream are covered by a Toxicity Reduction Action Plan.¹¹¹ Such an exemption represents the natural tension between the government's desire to ensure that a polluter is properly regulated under the CWA before issuing a RCRA exemption and the facility's desire not to be subjected to RCRA when it already complies with the CWA.¹¹² The effect of this exemption is that facilities with industrial discharge permits, which discharge hazardous waste into sewers also carrying domestic sewage, are not subject to RCRA requirements.¹¹³ However, EPA concluded that this exemption does not apply to TI.¹¹⁴ It concluded that the "exemption applies only from the point where industrial wastes mix with domestic sewage upon and after being discharged into a municipal sewer line."¹¹⁵ Therefore, it does not apply "while the wastewater remains within the site."¹¹⁶ Thus, EPA's interpretation of its requirement is that the facility must still comply with RCRA requirements regarding treatment and storage.¹¹⁷

3. Wastewater Treatment Units

Finally, federal RCRA regulations exempt wastewater treatment units from TSDF permitting requirements.¹¹⁸ To qualify as a wastewater treatment unit, the WWTP must meet three requirements.¹¹⁹ First, the facility must be part of a wastewater treatment facility that is subject to regulation under either section 402 or 307(b) of the CWA.¹²⁰ Second, the facility must receive and treat, or store, influent wastewater that is either defined as a hazardous waste or generates and accumulates wastewater treatment sludge.¹²¹ Third, the facility must meet the defini-

¹¹¹ Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards: Metal Products and Machinery, 60 Fed. Reg. 28,210, 28,269 (proposed May 30, 1995) (codified at 40 C.F.R. pt. 433, 438, 464).

¹¹² Nagel, *supra* note 110, at 213; *see, e.g.*, Nov. 17 Letter from EPA, *supra* note 33 (recognizing that the CWA can substitute for RCRA regulations).

¹¹³ TOUCHSTONE ENVTL., *supra* note 43, at B3-4.

¹¹⁴ Nov. 17 Letter from EPA, *supra* note 33 (citing a Region I regulatory interpretation letter dated April 19, 1999).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ 40 C.F.R. § 264.1(g)(6) (2005).

¹¹⁹ *Id.* § 260.10.

¹²⁰ *Id.*

¹²¹ *Id.*

tion of a tank, or a tank system.¹²² This exemption represents an example of permit-by-rule. The rule is primarily intended to exempt wastewater treatment units at facilities already subject to the NPDES or pretreatment CWA requirements from certain RCRA requirements.¹²³

TI argued that it met both the federal and analogous Massachusetts exceptions to RCRA permitting.¹²⁴ Hazardous waste facility management standards—that is, RCRA standards—do not apply to “industrial wastewater treatment facilities permitted pursuant to [the Massachusetts Clean Water Act].”¹²⁵ Such facilities are defined to include a wastewater treatment unit which treats, or treats and accumulates incidental to such treatment, hazardous influent wastewater.¹²⁶ The definition continues to provide that “[i]f treatment works receives hazardous waste from one or more off-site sources, all treatment, storage, and disposal units, and all accumulation at the site of the treatment works, are . . . not part of a ‘municipal or industrial wastewater treatment facility.’”¹²⁷ TI maintained that there is no requirement for unitary ownership for the facility to be considered “on-site.”¹²⁸

On-site is defined as “the same or geographically contiguous property in *single ownership* which may be divided by a public or private right-of-way, provided the entrance and exit between the properties is at a cross-roads intersection, and access is by crossing as opposed to going along the right-of-way.”¹²⁹ This single ownership requirement is a noticeable difference from EPA’s position.¹³⁰ However, TI still maintained that because it retained a perpetual easement in all of the pipes leading to and from the WWTP, and the term “on-site” necessarily includes contiguous land over which there is common ownership,¹³¹ it qualified for

¹²² *Id.* (“Tank means a stationary device, designed to contain an accumulation of hazardous waste which is constructed primarily of non-earthen materials . . . which provides structural support. Tank system means a hazardous waste storage or treatment tank and its associated ancillary equipment and containment system.”).

¹²³ Environmental Protection Agency, Pesticide Chemicals Category, Formulating, Packaging and Repackaging Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards, 61 Fed. Reg. 57,518, 57,529 (Nov. 6, 1996).

¹²⁴ Oct. 8 Letter from TI, *supra* note 29.

¹²⁵ *Id.*

¹²⁶ *Id.*; see 310 MASS. CODE REGS. 30.010 (2005).

¹²⁷ 310 MASS. CODE REGS. 30.010.

¹²⁸ See Oct. 8 Letter from TI, *supra* note 29.

¹²⁹ 310 MASS. CODE REGS. 30.010 (emphasis added). Compare this with the federal wastewater unit exemption in which there is no single ownership requirement. See discussion *infra* Part III.B.

¹³⁰ See *infra* notes 154–61 and accompanying text.

¹³¹ See Oct. 8 Letter from TI, *supra* note 29. TI cited two Massachusetts Supreme Court cases to support the proposition that easements constitute a broad ownership right in

the wastewater treatment exemption.¹³² The DEP disagreed and stated, "ownership, through easements or otherwise, of piping alone is not sufficient to create 'site' as defined by 310 CMR 30.000 regulations."¹³³

Thus, the DEP and EPA thought TI's proposed redevelopment plan did not qualify for any of the aforementioned exemptions to RCRA.¹³⁴ It was the DEP, however, that read a unitary ownership requirement into the wastewater treatment unit exemption—the most applicable RCRA exemption for the WWTP.¹³⁵ In order to understand DEP's position, it is necessary to examine the source of the wastewater unit exemption, the CWA.¹³⁶

III. PRETREATMENT PERMITS UNDER THE CWA

The modern CWA took form in 1972 after major amendments to the Federal Water Pollution Control Act.¹³⁷ Its declared purpose is to "re-store and maintain the chemical, physical, and biological integrity of the Nation's waters."¹³⁸ To achieve this end, all facilities discharging pollutants from point sources into navigable waters of the United States must obtain a National Pollutant Discharge Elimination System (NPDES) permit.¹³⁹ Included in this requirement are publicly owned treatment works (POTWs).¹⁴⁰ Because they discharge wastewater from treated sewage from a point source at the facility to a nearby water body, they must apply for a NPDES permit.¹⁴¹ Industrial discharges wishing to avoid the

property. *See* *Tehan v. Sec. Nat'l Bank*, 163 N.E.2d 646, 650 (Mass. 1954) ("In the absence of express limitations, such a general right of way obtained by grant may be used for such purposes as are reasonably necessary to the full enjoyment of the premises to which the right of way is appurtenant."); *Sullivan v. Donohoe*, 191 N.E. 364, 365 (Mass. 1934) ("When an easement or other property right is created, every right necessary for its enjoyment is included by implication.").

¹³² Oct. 8 Letter from TI, *supra* note 29.

¹³³ Notice of Noncompliance, *supra* note 7.

¹³⁴ *See* Nov. 17 Letter from EPA, *supra* note 33; Sept. 30 Letter from DEP, *supra* note 7.

¹³⁵ *See* Sept. 30 Letter from DEP, *supra* note 7.

¹³⁶ *See* discussion *infra* Part III.

¹³⁷ PLATER, *supra* note 45, at 620; *see* 32 U.S.C. § 1251 (2000). The Massachusetts Clean Water Act largely mirrors the federal act; however, in several major respects it is thought to reach beyond the CWA. MASSACHUSETTS ENVIRONMENTAL LAW, *supra* note 45, at 15-4; *see* MASS. GEN. LAWS ch. 21, §§ 26-53 (2002).

¹³⁸ 32 U.S.C. § 1251(a).

¹³⁹ TOUCHSTONE ENVTL., *supra* note 43, at B3-1 ("Under CWA, discharges from POTWs are unlawful unless they conform with applicable effluent limitations set by EPA and the state water quality agency."). *See generally* THE CLEAN WATER ACT HANDBOOK (Parthenia B. Evans ed., 1994).

¹⁴⁰ TOUCHSTONE ENVTL., *supra* note 43, at B3-1.

¹⁴¹ *Id.*

NPDES permit requirements could send wastewater to a POTW.¹⁴² However, in order to ensure that a POTW does not violate the terms and conditions of its own NPDES permits, all “indirect dischargers” must comply with pretreatment standards.¹⁴³

A. Section 307(b): Pretreatment Standards

Congress, in section 307(b) of the CWA, required EPA to establish pretreatment standards for the “introduction of pollutants into treatment works . . . which are publicly owned for those pollutants which are determined not to be susceptible to treatment by such treatment works or which would interfere with the operation of such treatment works.”¹⁴⁴ Essentially, the pretreatment standards are to apply to industrial facilities that discharge wastewater into a sewer system that leads to a POTW.¹⁴⁵ National pretreatment standards can take two forms: prohibitions on discharges to POTWs and categorical standards.¹⁴⁶ Prohibitions can be either broadly defined as any pollutant that interferes with POTW operations or specifically enumerated from a list of pollutants.¹⁴⁷ National categorical pretreatment standards apply to all facilities in a particular industry.¹⁴⁸ They are based upon the pollutant removals that can be achieved using the best available demonstrated control technology (BADT)¹⁴⁹ for new point sources, and they specify the

¹⁴² Kenneth M. Murchison, *Learning from More Than Five-and-a-Half Decades of Federal Water Pollution Control Legislation: Twenty Lessons for the Future*, 32 B.C. ENVTL. AFF. L. REV. 527, 543 (2005).

¹⁴³ 40 C.F.R. § 403.3(g) (2003) (“[T]he introduction of pollutants into a POTW from any non-domestic source regulated under section 307(b), (c) or (d) of the [CWA].”); TOUCHSTONE ENVTL., *supra* note 43, at B3-2 (noting that industrial facilities are “commonly referred to as ‘indirect dischargers’ because they do not directly discharge into receiving waters, but instead discharge through POTWs to receiving waters”).

¹⁴⁴ 33 U.S.C. § 1317(b)(1) (2000). “Pretreatment means the reduction of the amount of pollutants, the elimination of pollutants, or the alteration of the nature of pollutant properties in wastewater prior to or in lieu of discharging or otherwise introducing such pollutants into a POTW.” 40 C.F.R. § 403.3(q).

¹⁴⁵ TOUCHSTONE ENVTL., *supra* note 43, at B3-1 to -2; see THE CLEAN WATER ACT HANDBOOK, *supra* note 139, at 121–23.

¹⁴⁶ TOUCHSTONE ENVTL., *supra* note 43, at B3-2 to -4.

¹⁴⁷ *Id.* at B3-2. The list of specific pollutants includes pollutants that would cause fire or explosion, are corrosive, petroleum oil, and pollutants that would produce toxic gases and vapors. *Id.*

¹⁴⁸ THE CLEAN WATER ACT HANDBOOK, *supra* note 139, at 122; see 40 C.F.R. §§ 405–71.

¹⁴⁹ THE CLEAN WATER ACT HANDBOOK, *supra* note 139, at 122; Murchison, *supra* note 142, at 540–41 (noting that industrial discharges whose construction commenced after the publication of proposed regulations would have to comply with BADT standards as opposed to best available control technology economically achievable (BAT)).

quantities and concentrations of pollutants that may be discharged into POTWs.¹⁵⁰

Generally, a nondomestic source may not discharge to a POTW any pollutant which would cause pass-through or interference.¹⁵¹ Pass-through is "discharge which exits the POTW into the waters of the United States in quantities or concentrations which . . . is a cause of a violation of any requirement of the POTW's NPDES permit."¹⁵² Interference, as the name suggests, is discharge which "inhibits or disrupts the POTW" such that it is a cause of a violation of the POTW's NPDES permit.¹⁵³

B. Wastewater Treatment Facility—Clarified

In 1988, EPA responded to several inquiries regarding the meaning of the term "wastewater treatment facility."¹⁵⁴ EPA explained that it used a "property-boundary" interpretation of the term "facility," and the wastewater treatment unit must be "on-site" to satisfy the purpose of the exemption.¹⁵⁵ This definition of on-site, however, was no more clear than its previous definition.¹⁵⁶ EPA did, however, make it clear that "any tank system that was employed in managing wastewater at a facility prior to its off-site transfer to another location . . . *is not covered by this exemption.*"¹⁵⁷ In order to further clarify the definition, the Chemical Manufacturers Association requested that EPA rule on a number of hypothetical situations.¹⁵⁸ Most importantly, example number two provided:

Companies A and B, located within the same RCRA facility-boundaries, use a common sewer to send wastewater from each of their respective units to an on-site NPDES permitted waste-

¹⁵⁰ TOUCHSTONE ENVTL., *supra* note 43, at B3-3.

¹⁵¹ *Id.* at B3-2; Murchison, *supra* note 142, at 543.

¹⁵² 40 C.F.R. § 403.3(n).

¹⁵³ *Id.* § 403.3(i).

¹⁵⁴ Environmental Protection Agency, Rules and Regulations, Hazardous Waste Management System; Standards for Hazardous Waste Storage and Treatment Tank System, 53 Fed. Reg. 34,079, 34,080 (Sept. 2, 1988).

¹⁵⁵ *Id.*

¹⁵⁶ See, e.g., Letter from David Bussard, Acting Dir., Waste Mgmt. Div., Env'tl. Prot. Agency, to James C. Mulligan, Manager, Solid Waste Program, Chemical Mfrs. Ass'n (June 1, 1990) (on file with author) [hereinafter June 1 Letter from EPA] (giving hypothetical examples to help clarify what "on-site" means).

¹⁵⁷ Environmental Protection Agency, Rules and Regulations, Hazardous Waste Management System; Standards for Hazardous Waste Storage and Treatment Tank System, 53 Fed. Reg. at 34,080 (emphasis added).

¹⁵⁸ June 1 Letter from EPA, *supra* note 156.

water treatment facility owned by Company A. The NPDES permit limits are based on the waste loads from both companies' units.¹⁵⁹

In its analysis, EPA focused primarily on the ability of CWA authorities to prescribe and enforce tank system requirements at both companies.¹⁶⁰ To do so, both companies needed to be co-signatory to a NPDES (or in TI's case, pretreatment) permit under the CWA.¹⁶¹

Therefore, it is clear that EPA does not require single ownership of a TSDF located on a contiguous site.¹⁶² In order for this exemption to apply, however, all companies involved in handling hazardous wastewaters must be made subject to the CWA.¹⁶³ According to EPA, the CWA regulation substitutes for RCRA regulations in two distinct ways.¹⁶⁴ First, the pretreatment permit will regulate the treatment process and discharge itself through numerical effluent limitations, and therefore it would be redundant to regulate it through RCRA.¹⁶⁵ Second, a pretreatment permit will also regulate the connecting pipes between companies and the WWTP, and ensure there are operation and maintenance standards.¹⁶⁶ This will justify not regulating those companies under RCRA generator or other requirements.¹⁶⁷

With these two justifications in mind, EPA provided TI with two minimum permit requirements that would satisfy the federal RCRA exemption.¹⁶⁸ First, NewStream—the operator of the WWTP—must be specified in the pretreatment permit as responsible for the operation and maintenance of the pipes, as well as responsible for the operation and maintenance of the treatment facility.¹⁶⁹ Second, the permit must specify that each individual company on the Attleboro Corporate Campus is responsible for the pipes that are operated within their own buildings.¹⁷⁰ Ultimately, for the RCRA exemption to apply, EPA requires that

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *See id.*

¹⁶² Nov. 17 Letter from EPA, *supra* note 33 (“[T]he EPA has applied the wastewater treatment unit exemption to operations involving more than one company located on a contiguous site . . .”).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Nov. 17 Letter from EPA, *supra* note 33.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

"CWA authorities can prescribe and enforce tank system requirements" at both companies.¹⁷¹ Even though all the pipes, whether they were inside or outside of buildings, were to be owned and operated by TI, EPA concluded, "only the inclusion in a CWA permit of [TI] as being responsible for the pipes [outdoors] and the inclusion of [other companies] being responsible for their indoor pipes will achieve that objective."¹⁷²

C. Water Quality Trading: An Indication that EPA Is Moving in the Right Direction

Although not directly relevant to pretreatment permits under section 307(b) of the CWA, EPA's Water Quality Trading Policy may serve as a helpful example in the evolving nature of environmental law.¹⁷³ Water Quality Trading (WQT) is a market-based approach to pollutant control actions, taken at different geographic locations, often by a party different from the source obligated to achieve the pollution reduction.¹⁷⁴ The commodities in the WQT market are pollution reduction "credits," which represent a unit of pollution control beyond a defined baseline.¹⁷⁵ EPA states that "market-based approaches such as water quality trading provide greater flexibility and have potential to achieve water quality and environmental benefits greater than would otherwise be achieved under more traditional regulatory approaches."¹⁷⁶ WQT programs would also hopefully "create economic incentives for innovation, emerging technology, voluntary pollution reductions and greater efficiency in improving the quality of the nation's waters."¹⁷⁷

The threshold condition for implementing a WQT is that the nature and the extent of the water quality problem is understood, and a Total Maximum Daily Load (TMDL) or consensus reduction target

¹⁷¹ *Id.* (quoting June 1 Letter from EPA, *supra* note 156).

¹⁷² *Id.*

¹⁷³ See Environmental Protection Agency; Water Quality Trading Policy; Issuance of Final Policy, 68 Fed. Reg. 1608, 1608 (Jan. 13, 2003), *available at* <http://www.epa.gov/owow/watershed/trading/finalpolicy2003.pdf>.

¹⁷⁴ See *id.*; Lynda Hall & Eric Raffini, *Water Quality Trading: Where Do We Go from Here?*, 20 NAT. RESOURCES & ENV'T 38, 38 (Summer 2005).

¹⁷⁵ Environmental Protection Agency; Water Quality Trading Policy; Issuance of Final Policy, 68 Fed. Reg. at 1609 ("[Trading] allows one source to meet its regulatory obligations by using pollutant reductions created by another source that has with lower pollution control costs."); Hall & Raffini, *supra* note 174, at 38.

¹⁷⁶ Environmental Protection Agency; Water Quality Trading Policy; Issuance of Final Policy, 68 Fed. Reg. at 1609.

¹⁷⁷ *Id.*

based on water quality is set.¹⁷⁸ The basic theory is that different discharges can use economies of scale to reduce costs while at the same time lowering the overall level of pollution in a particular watershed.¹⁷⁹ By focusing on the overall water quality in a particular shed, one effect of WQT is the reduction of nonpoint source pollution—such as agricultural runoff, which is completely outside the scope of the CWA—allowing point sources to technically violate the effluent limits of their NPDES permits while at the same time increasing the overall quality of the particular watershed.¹⁸⁰

IV. POTENTIAL SOLUTIONS TO TI'S WASTEWATER TREATMENT PLANT PROBLEM UNDER RCRA

TI's situation in Attleboro represents a novel problem in environmental law. The permitting requirements and procedures promulgated by the Massachusetts DEP and U.S. EPA are not working in the best interests of the environment or the community at large.¹⁸¹ Logic demands that NewStream should be able to continue to operate its state of the art WWTP.¹⁸² The redevelopment of the Attleboro Corporate Campus would allow smaller companies to reduce costs by moving into a park that already has a facility to handle hazardous waste.¹⁸³ The development would undeniably bolster the local economy, and the presence of diverse businesses would not leave it vulnerable to the decisions of one company.¹⁸⁴ However, the permits required by the DEP may prove to be prohibitively expensive and time consuming.¹⁸⁵ As the first generation of environmental regulation comes to an end, it is time for state and

¹⁷⁸ Hall & Raffini, *supra* note 174, at 40. While the CWA primarily requires technology-based effluent limits, water quality based limitations are used to meet water quality standards in receiving waters. See MASSACHUSETTS ENVIRONMENTAL LAW, *supra* note 45, at 15-3. A TMDL is the amount of a pollutant that can be discharged into water that failed to meet the CWA's water quality standards. Murchison, *supra* note 142, at 546.

¹⁷⁹ Hall & Raffini, *supra* note 174, at 38.

¹⁸⁰ *Id.*

¹⁸¹ See Seidenfeld, *supra* note 33, at 451 (representing a good example of an "agency us[ing a decision-making] norm to avoid having to devote resources to thinking through the particular decision in light of every factor that potentially might bear on its wisdom"); Sept. 28 Letter from TI, *supra* note 15.

¹⁸² See Sept. 28 Letter from TI, *supra* note 15.

¹⁸³ See *TI Consolidates Its Shrinking Attleboro Operations*, *supra* note 5.

¹⁸⁴ See *id.*

¹⁸⁵ Cf. Murchison, *supra* note 142, at 582-83 (criticizing EPA's use of formal cost-benefit analysis promulgating water quality standards. However, EPA and DEP refused to recognize the overall economic benefit to the continued operation of the WWTP). See generally Feder, *supra* note 53.

federal environmental agencies to focus less on the letter of the procedure and more on the overall effect.¹⁸⁶

A. Broaden the Definition of Totally Enclosed Treatment Facility

1. The Federal Totally Enclosed Treatment Facility Requirement

At first inspection it appears that the WWTP at the Attleboro Corporate Campus is a totally enclosed facility.¹⁸⁷ The WWTP, however, must meet the three parts of the definition in order to qualify as a totally enclosed facility.¹⁸⁸ First, the facility must be directly connected to an industrial production process.¹⁸⁹ Second, the WWTP must be connected to all surrounding buildings by a hard-pipe system.¹⁹⁰ Third, it must be constructed and operated in a manner that prevents the release of any hazardous waste or any constituent thereof into the environment during treatment.¹⁹¹

The WWTP at the Attleboro Corporate Campus would easily satisfy the first requirement, as it is a totally enclosed facility.¹⁹² The entire purpose of the project is to create an industrial park where smaller companies can discharge their industrial waste directly to an on-site WWTP.¹⁹³ Second, the piping would be on a geographically contiguous property under common ownership, with different companies discharging their industrial waste into the pipes that run into the WWTP.¹⁹⁴ Third, it is possible to consider the WWTP as a facility that is constructed and operated in a manner that prevents the release of any hazardous waste or any constituent thereof into the environment during the treatment.¹⁹⁵ This system of pipes is above ground for easy inspection in order to prevent

¹⁸⁶ See Murchison, *supra* note 142, at 586–87 (noting that regulatory paradigms can become too entrenched in a continually evolving environmental arena); Seidenfeld, *supra* note 33, at 439–40 (noting that the traditional model of administrative law sought to balance the tension between discretion and constraint by requiring agencies to limit their own discretion, but that this model forces agencies to conform with rules that may be unwise in the particular context); see, e.g., Hall & Raffini, *supra* note 174 (discussing Water Quality Trading (WQT) as one way to incorporate some flexibility into the CWA).

¹⁸⁷ See 40 C.F.R. § 260.10 (2005).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Oct. 8 Letter from TI, *supra* note 29.

¹⁹¹ 40 C.F.R. § 260.10.

¹⁹² See *id.*

¹⁹³ See *TI Consolidates Its Shrinking Attleboro Operations*, *supra* note 5.

¹⁹⁴ Oct. 8 Letter from TI, *supra* note 29.

¹⁹⁵ See 40 C.F.R. § 260.10.

spills, leaks, or emissions.¹⁹⁶ NewStream—as the operator—would have full dominion and control over the piping and existing systems integral to operating the WTP, including ownership of all the utilities and power servicing the property.¹⁹⁷ Given the physical layout of the plant and the retention of property rights in the piping and systems integral to operation, it can be concluded that NewStream’s WTP is a “totally enclosed facility.”¹⁹⁸

EPA’s definition of a totally enclosed facility, however, is much narrower than its logical reading.¹⁹⁹ EPA regulations state, “[I]f a facility leaks, spills, or discharges waste or waste constituents, or emits waste or waste constituents into the air during treatment, it is not a totally enclosed treatment facility.”²⁰⁰ Within the definition itself, EPA asserts, “An example is a pipe in which waste acid is neutralized.”²⁰¹ The use of the term “neutralized” indicates that no emissions *of any kind* are allowed in order for the facility to be totally enclosed.²⁰² This interpretation completely ignores the characteristics of the waste itself—including whether it is hazardous.²⁰³ Thus, if a company later discharges the acid it neutralized in a pipe, under this definition the company would no longer be exempt from RCRA regulation.²⁰⁴

Interestingly, EPA’s decision does not indicate that it was the discharge of the treated waste into Attleboro’s sewers that was fatal to TI’s attempt at defining its WTP as totally enclosed.²⁰⁵ Rather, EPA cited that “this kind of operation has at least some potential for having fugitive or other air emissions.”²⁰⁶ Granted, this interpretation of totally enclosed facility has been accepted for over fifteen years.²⁰⁷ However, the possibility of fugitive or other air emissions is best left outside the scope

¹⁹⁶ Oct. 8 Letter from TI, *supra* note 29.

¹⁹⁷ *Id.* (noting that NewStream would therefore be able to control the pumps, valves, and electrical power that controls individual company wastewater discharges); Sept. 28 Letter from TI, *supra* note 15.

¹⁹⁸ See 40 C.F.R. § 260.10.

¹⁹⁹ See Nov. 17 Letter from EPA, *supra* note 33.

²⁰⁰ Environmental Protection Agency, Rules and Regulations, Hazardous Waste Treatment, Storage, and Disposal Facilities—Organic Air Emission Standards for Process, Vents and Equipment Leaks, 55 Fed. Reg. 25,454, 25,467 (June 21, 1990).

²⁰¹ 40 C.F.R. § 260.10.

²⁰² See *id.*

²⁰³ See *id.*

²⁰⁴ See *id.*

²⁰⁵ Nov. 17 Letter from EPA, *supra* note 33.

²⁰⁶ *Id.*

²⁰⁷ See Environmental Protection Agency, Rules and Regulations, Hazardous Waste Treatment, Storage, and Disposal Facilities—Organic Air Emission Standards for Process Vents and Equipment Leaks, 55 Fed. Reg. at 25,467 (June 21, 1990).

of RCRA, so that state-of-the-art facilities such as the WWTP in question can operate to their full capabilities.²⁰⁸ RCRA has been described as a cradle-to-grave system of regulation of hazardous waste; however, when the cradle and the grave are on geographically contiguous property, it seems excessive to require companies to go through a substantial permitting process.²⁰⁹

2. The Massachusetts Analog

The analogous exemption under Massachusetts law excludes discharge of a treatment process which is integral to the manufacturing process from its RCRA requirements.²¹⁰ Treatment which is integral to the manufacturing process is defined as:

[A]ny treatment method or technique which is at the site of generation of the waste, is not primarily for the purpose of recycling hazardous waste, and is: (a) Directly connected via pipes or the equivalent from an industrial production process . . . ; and (b) Totally enclosed so that it is designed, constructed, and operated to prevent spills, leaks, or emissions of hazardous materials to the environment.²¹¹

The WWTP is directly connected by above-ground pipes to all of the buildings on the corporate campus.²¹² All of the piping is lined or double-walled and is located so as to allow for easy inspection.²¹³ Furthermore, NewStream has ownership of the utilities and power servicing the other buildings, and would thereby retain control of the pumps, valves, and electrical power that controls the wastewater discharge.²¹⁴ Therefore, as opposed to EPA requirements, the WWTP is totally enclosed as it is designed, constructed, and operated to prevent spills, leaks, or emissions of *hazardous materials* to the environment.²¹⁵ Finally, the treatment takes place at the site of generation and is not primarily

²⁰⁸ See, e.g., Murchison, *supra* note 142, at 586–87 (discussing the continually evolving environmental arena).

²⁰⁹ See PLATER, *supra* note 45, at 845.

²¹⁰ See 310 MASS. CODE REGS. 30.501(2)(b) (2004).

²¹¹ *Id.* at 30.010.

²¹² Oct. 8 Letter from TI, *supra* note 29.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ See 310 MASS. CODE REGS. 30.010. Compare this to the EPA requirement, in which a totally enclosed facility can emit *nothing* into the environment at all, regardless of its non-hazardous character. 40 C.F.R. § 260.10 (2005).

for the purpose of recycling hazardous waste.²¹⁶ Given this analysis, under Massachusetts law the WWTP should qualify for the exemption to obtaining a RCRA permit.

B. *The Federal Solution: Allow NewStream to Operate the WWTP Under the Wastewater Treatment Unit Exemption to RCRA*

EPA has stated that in order for an owner or operator to qualify for the wastewater treatment unit exemption, the WWTP must meet the three tests spelled out in the definition of “wastewater treatment unit.”²¹⁷ The facility must be part of a wastewater treatment facility that is subject to regulation under either sections 402 or 307(b) of the CWA; it must receive and treat or store influent wastewater that is defined as hazardous waste; and the facility must meet the definition of a tank or a tank system.²¹⁸ This exemption is essentially intended to exempt wastewater treatment units at facilities that are subject to the NPDES or pretreatment requirements under the CWA.²¹⁹

EPA conceded that the WWTP at the Attleboro Corporate Campus met the second and third test set forth in the regulation.²²⁰ All wastewaters are either being treated or stored as influent wastewaters.²²¹ EPA explicitly stated that wastewater traveling through outdoor pipes between two separately owned companies was within the definition of “storage.”²²² Furthermore, EPA agreed that all the wastewater could be contained in a tank system, so long as the system remained hard-piped.²²³ Thus, despite being owned by separate companies, if all the pipes within the separate buildings remained connected to outdoor pipes, and those outdoor pipes in turn remained connected to treatment tanks, “the entire system will be a inter-connected ‘tank system.’”²²⁴

EPA, however, had a problem applying the wastewater treatment unit exemption to TI’s WWTP because it remained unclear whether it was properly permitted under the pretreatment requirements of sec-

²¹⁶ See 310 MASS. CODE REGS. 30.010; Oct. 8 Letter from TI, *supra* note 29.

²¹⁷ Nov. 17 Letter from EPA, *supra* note 33; see 40 C.F.R. § 260.10.

²¹⁸ See 40 C.F.R. § 260.10.

²¹⁹ See Nov. 17 Letter from EPA, *supra* note 33.

²²⁰ *Id.*

²²¹ *Id.*

²²² See *id.*

²²³ *Id.*

²²⁴ *Id.* (EPA further stated that as new companies “locate on site and generate hazardous wastewaters, their discharges similarly will need to go through an inter-connected hard-piped system in order to maintain the exemption”).

tion 307(b) of the CWA.²²⁵ In its pretreatment permit, EPA stated that: (1) NewStream must be specified as responsible for both the operation and maintenance of the pipes it leases to other companies, as well as the municipal sewer discharges; and (2) the individual companies must be specified in the permit as being responsible for the operation and maintenance of the pipes they operate within their building.²²⁶ These conditions properly ensure that responsibility under the CWA for the operation and maintenance of the pipes is delegated to the appropriate parties.²²⁷ However, a lengthy re-permitting process is not necessary each time a new company moves onto the Attleboro Corporate Campus.²²⁸ In fact, EPA implied that the new companies can enter into a contract if NewStream accepts full and unconditional responsibility under the CWA for the operation and maintenance of the pipes.²²⁹ Allowing NewStream to contract individually with new arrivals would avoid the need to undergo a lengthy re-permitting process every time a new company moves onto the campus.²³⁰

Furthermore, independent contracting between NewStream and arriving companies would be consistent with the spirit of the wastewater treatment unit exemption.²³¹ First, by regulating the discharge under the CWA, it would be superfluous to also regulate the treatment process under RCRA.²³² Second, pretreatment permits under section 307(b) of the CWA typically include requirements for proper operation and maintenance.²³³ Thus, by ensuring that at least the operation and maintenance of the pipes and the character of the discharge is already regulated under the CWA, any further regulation would be unnecessary.²³⁴ However, in its closing remarks, EPA reminded TI that the DEP was free

²²⁵ Nov. 17 Letter from EPA, *supra* note 33.

²²⁶ *Id.*

²²⁷ *See id.*

²²⁸ *See id.*

²²⁹ *See id.*

²³⁰ *See id.* While NewStream may have to accept "unconditional responsibility under the CWA," nothing in EPA's letter precludes NewStream from imposing strict compliance procedures and an indemnification clause in its "side agreements." *See id.*

²³¹ *See* Seidenfeld, *supra* note 33, at 454 (arguing that agencies should be structured to guard against the use of decision-making norms that implement values inconsistent with those shared by the polity generally); Nov. 17 Letter from EPA, *supra* note 33.

²³² *See* Nov. 17 Letter from EPA, *supra* note 33.

²³³ *See, e.g.,* 40 C.F.R. § 403.10(f)(ii) (2005) (noting that a state pretreatment permit must ensure continuing compliance through review of self-monitoring reports).

²³⁴ *See* Nov. 17 Letter from EPA, *supra* note 33.

to apply the wastewater treatment unit exemption in a more stringent manner²³⁵—an invitation the DEP wholeheartedly accepted.²³⁶

C. The Massachusetts Solution: Remove the Implied Unitary Ownership Requirement

Similarly, under the analogous exemption from Massachusetts RCRA requirements, industrial wastewater treatment units are exempt from hazardous waste facility licensing.²³⁷ According to the regulations, a wastewater treatment unit is a facility which treats, or treats and accumulates incidental to such treatment, influent wastewater that is hazardous.²³⁸ On its face, it again appears that the WWTP at the Attleboro Corporate Campus meets this definition. Industrial companies transport, through a hard-pipe system, industrial waste that is a byproduct of their industry.²³⁹ However, the regulations also note that if the treatment plants receives hazardous waste from one or more *off-site* sources, the WWTP is not considered an industrial wastewater treatment facility.²⁴⁰ Therefore, it is necessary to examine the definition of on-site to see if there is a requirement for unitary ownership.²⁴¹ Accordingly, in order to be considered on-site, the regulations explicitly require the facility to be on “the same or geographically contiguous property in single ownership.”²⁴² Essentially, Massachusetts requires that the wastewater treatment unit exemption applies only if the generator is treating its own waste.²⁴³

This requirement is too narrow for several reasons. While EPA allowed Massachusetts to adopt stricter compliance standards, it is important to recognize that Massachusetts’s program is inconsistent with EPA’s standards.²⁴⁴ EPA does not have a unitary ownership requirement, and, in fact, explicitly allows for multiple companies to discharge hazardous waste to the WWTP while still allowing it qualify for the wastewater treatment exemption.²⁴⁵ Massachusetts’s requirements run contrary to the very purpose of the exemption—they force companies

²³⁵ *See id.*

²³⁶ *See* discussion *infra* Part V.

²³⁷ 310 MASS. CODE REGS. 30.801(4) (2004).

²³⁸ *Id.* § 30.010.

²³⁹ *See* Oct. 8 Letter from TI, *supra* note 29.

²⁴⁰ *See* 310 MASS. CODE REGS. 30.010.

²⁴¹ *See id.*

²⁴² *Id.*

²⁴³ *See id.*

²⁴⁴ *See* Nov. 17 Letter from EPA, *supra* note 33.

²⁴⁵ *Id.*

to go through the time-consuming and superfluous process of double permitting.²⁴⁶ In fact, the Massachusetts regulations actually *require* double permitting in these situations.²⁴⁷ A literal reading of this requirement would also allow for the possibility of creating a dummy corporation to "own" all of the companies on the property.²⁴⁸ This additional paperwork would allow companies at the Attleboro Corporate Campus to operate the WWTP; however, the whole point of EPA's wastewater treatment unit exemption is to avoid additional bureaucracy.²⁴⁹

Another approach is to examine the property interest that TI, and then NewStream, reserved in the pipes, and find that all the sources of the WWTP are on-site.²⁵⁰ Massachusetts regulations do not limit the nature of the ownership interest required.²⁵¹ Ownership can include property interests held by easement.²⁵² NewStream maintained a perpetual easement in all piping throughout the system.²⁵³ Several Massachusetts Supreme Judicial Court cases have upheld easements that constitute a broad ownership right in property.²⁵⁴ Therefore, there are no "off-site sources" within the definition of the term because NewStream has an ownership right in the pipes where the hazardous waste is generated.²⁵⁵ The DEP summarily dismissed this contention in its finding of fact by asserting that easements do not constitute the requisite property interest to qualify for the exemption.²⁵⁶

²⁴⁶ See *supra* notes 230–36 and accompanying text.

²⁴⁷ See 310 MASS. CODE REGS. 30.010 (noting that facilities that accept waste from off-site sources do not qualify for the wastewater treatment unit exemption and that they must also be regulated under the Massachusetts analogs to section 307(b) of the CWA).

²⁴⁸ See *id.* TI considered this possibility, but later discarded it because it would be too troublesome. *Id.*

²⁴⁹ See *supra* notes 230–36 and accompanying text (discussing the superfluous nature of the requirement of double permitting).

²⁵⁰ This is the approach that TI took. See Oct. 8 Letter from TI, *supra* note 29 (arguing for all land being considered under "common ownership").

²⁵¹ See *id.*; 310 MASS. CODE REGS. 30.010.

²⁵² Oct. 8 Letter from TI, *supra* note 29.

²⁵³ *Id.*

²⁵⁴ See, e.g., *Tehan v. Sec. Nat'l Bank*, 163 N.E.2d 646, 650 (Mass. 1954); *Sullivan v. Donohoe*, 191 N.E. 364, 365 (Mass. 1934).

²⁵⁵ See Oct. 8 Letter from TI, *supra* note 29.

²⁵⁶ See Notice of Noncompliance, *supra* note 7.

V. POTENTIAL SOLUTIONS TO TI'S WASTEWATER TREATMENT PLANT PROBLEM UNDER THE CWA

The CWA has been criticized by commentators as being inefficient and forcing “treatment for treatment’s sake.”²⁵⁷ However, in this instance the CWA can operate to promote both efficiency and cost-reduction. As EPA indicated, in order to qualify for a wastewater treatment unit exemption, the plant must be regulated under section 307(b) of the CWA.²⁵⁸ The pretreatment standards of section 307(b) require all indirect discharges—industrial facilities that discharge wastewater into a sewer system that leads to a POTW—to comply with local standards so that the POTW does not violate its NPDES permit.²⁵⁹ Given this purpose, POTWs and the local municipalities are clearly in the best position to determine the relevant pretreatment standards, as they are more familiar with the capabilities of their plant.²⁶⁰ In addition, these regulations should apply more to the characteristics of the discharged waste from the WWTP facility and not to who owns the plant.²⁶¹ The Massachusetts DEP clearly disagrees, and such a rigid position is detrimental to achieving the articulated goals of the CWA.²⁶²

The increasing success and popularity of Water Quality Trading (WQT) serves as an example of the novel approaches EPA is taking in order to adapt to evolving attitudes and expectations in environmental law.²⁶³ Point source discharges that violate the effluent limits of their National Pollutant Discharge Elimination System (NPDES) permits need not close operations or spend excessive amounts of money to

²⁵⁷ See Murchison, *supra* note 142, at 580. Furthermore, this is not a situation in which Congress has limited EPA’s discretion by attempting to micro-manage EPA’s policy. See Seidenfeld, *supra* note 33, at 442–43 (noting that some aspects of federal environmental law promote the adoption of unrealistically strict standards).

²⁵⁸ See Nov. 17 Letter from EPA, *supra* note 33.

²⁵⁹ See TOUCHSTONE ENVTL., *supra* note 43, at B3-2.

²⁶⁰ See *id.* at B3-1 to -3; Murchison, *supra* note 142, at 597–98 (noting that individual controls can even achieve better water quality because some facilities are capable of reducing discharge beyond national categorical standards). For an argument explaining why and how the city should be the environmental enforcer, see generally Peter H. Lehner, *Act Locally: Municipal Enforcement of Environmental Law*, 12 STAN. ENVTL. L.J. 50 (1993).

²⁶¹ See Notice of Noncompliance, *supra* note 7.

²⁶² Sept. 30 Letter from DEP, *supra* note 7 (“[TI’s] arrangement may jeopardize the exemption TI maintains from . . . [TSDF licensing] insofar as TI is properly licensed under [Massachusetts’ CWA] to treat only its own hazardous industrial wastes.”); see Murchison, *supra* note 142, at 580 (noting that a lack of political will to pursue the principal ambitions of the CWA is responsible for the imperfections in the Act); Seidenfeld, *supra* note 33, at 454.

²⁶³ See Hall & Raffini, *supra* note 174, at 38.

come into compliance.²⁶⁴ Rather, they can enter into agreements with other point and nonpoint sources in a better position to reduce their pollutant discharge.²⁶⁵ The win-win situation is obvious—the company can continue operating, and the goals of the CWA are met—namely overall pollution is reduced.²⁶⁶ Furthermore, WQT programs emphasize the importance of a watershed-specific decision-making process, indicating EPA's recognition that some water quality decisions are best made at the local level.²⁶⁷

In 1990, even before EPA recognized the need for flexibility, and under a much more environmentally friendly administration, it ruled on a hypothetical situation that is very similar to the circumstances of this case.²⁶⁸ Two different companies (indicating separate ownership) sent wastewater to an on-site NPDES permitted wastewater treatment facility owned by Company A.²⁶⁹ In its analysis, EPA focused primarily on the ability of CWA authorities to prescribe and enforce tank system requirements at both companies.²⁷⁰ Ownership of the companies was irrelevant; in its letter to TI, EPA explicitly stated that it “has applied the wastewater treatment unit exemption to operations involving more than one company located on a contiguous site.”²⁷¹

Massachusetts regulations are already equipped with the mechanism to allow TI to transfer its pretreatment permit to NewStream.²⁷² Section 7.13(b) explicitly provides that the permit transfer must include “a written agreement between the existing and new permittees containing a specific date for transfer of *permit responsibility, coverage, and liability between them*.”²⁷³ TI's transfer of operation of the WWTP to NewStream would necessarily have to include a statement of the transfer of permit responsibilities that EPA required.²⁷⁴ The DEP asserted that sec-

²⁶⁴ *See id.*

²⁶⁵ *See id.* at 38–39.

²⁶⁶ *See id.* at 42.

²⁶⁷ *See id.* at 39. In fact, one recognized constraint on WQT activity is that unlike air emissions trading—which typically operates in national or large regional markets—decisions to proceed with WQT must be made watershed-by-watershed. *Id.* The obvious reasoning behind this is that the effects of water pollution control are more confined by geographic areas, and in order for WQT to be effective the pollution control credit must actually reduce the pollution in the relevant watershed. *Id.* at 39–40.

²⁶⁸ *See* June 1 Letter from EPA, *supra* note 156.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ Nov. 17 Letter from EPA, *supra* note 33.

²⁷² *See* 314 MASS. CODE REGS. 7.13 (2004) (outlining the requirements for transfer of permits).

²⁷³ *Id.* (emphasis added).

²⁷⁴ *See id.*; *see also* Nov. 17 Letter from EPA, *supra* note 33.

tion 7.13 only applies when “changing ownership and/or operation from one single entity to another single entity for like operations.”²⁷⁵ This assertion does not come from any specific language of section 7.13 but rather from the general principle that pretreatment permits are only issued under section 7.00 to companies that “treat [their] own hazardous industrial waste.”²⁷⁶ If Massachusetts could abandon this unitary ownership requirement, and attempt to work with NewStream, there would be no problem.²⁷⁷

There are two overriding implications in this CWA analysis. First, the addition of a new company to the Attleboro Corporate Campus (EMSI) did not affect the character or composition of the discharge of the WWTP.²⁷⁸ Therefore, it was not the discharge itself that resulted in the violation of the pretreatment permit but rather the ownership of the company that created the treated waste.²⁷⁹ As the City of Attleboro is in the best position to set the pretreatment standards for its POTW, it is likewise in the best position to determine whether the addition of other companies to the Corporate Campus would result in a violation of its NPDES permit.²⁸⁰ Given the purpose of the pretreatment permit—to ensure that industrial discharge does not result in a POTW violating its NPDES permit—the character and composition of the waste should be considered in determining the applicability of section 307(b).²⁸¹ Second, CWA regulations operate primarily on technology-based standards.²⁸² These standards should operate to encourage the operation of state of the art facilities like the one in Attleboro, and not be read to have implicit unitary ownership requirements.²⁸³

CONCLUSION

In 1997, the Attleboro Corporate Campus had fifteen manufacturing buildings operating and disposing hazardous waste to a state of the art WWTP. Presently, all fifteen buildings are not occupied, and no one

²⁷⁵ Sept. 30 Letter from DEP, *supra* note 7.

²⁷⁶ *See id.*

²⁷⁷ *See id.*

²⁷⁸ *See* Notice of Noncompliance, *supra* note 7.

²⁷⁹ *See* Sept. 30 Letter from DEP, *supra* note 7.

²⁸⁰ *See* Nagel, *supra* note 110, at 216 (asserting that “an individual POTW is in the best position to determine which industrial discharges it can safely address and still meet the discharge limits placed in its NPDES permit”).

²⁸¹ *See* discussion *supra* Part III.A.

²⁸² *See* THE CLEAN WATER ACT HANDBOOK, *supra* note 139, at 125–26; Murchison, *supra* note 142, at 540–43.

²⁸³ *See* Murchison, *supra* note 142, at 540–43.

is allowed to use the WWTP to treat hazardous waste.²⁸⁴ The only difference in the two years seems to be that one company does not own all of the buildings on the corporate campus.²⁸⁵ The recent evolution of environmental law has increased air quality, water quality, and most importantly, public consciousness. The next generation of environmental law, however, need not rely on tough regulations and extensive permitting to achieve its goal.²⁸⁶ Rather, it should focus on EPA working with industry to achieve the common good.

The story of the struggle between industry and environmental agencies is nothing new. For years, the law has acted to prevent greedy industrialists from taking advantage of the environment. The new paradigm is that some industrial companies have accepted environmental regulation, and now over regulation in environmental law serves as a barrier to environmentally conscious companies like TI.²⁸⁷ TI had nothing to gain by ensuring the continued operation of the WWTP. Yet, it developed a plan to save the plant, offset the effect its consolidation would have on the Attleboro workforce, and provide smaller manufacturing companies with all the facilities they would need at one location. That plan was met with a Notice of Noncompliance and an administrative penalty—a response that surely will only perpetuate the strain between environmental agencies and industry.

²⁸⁴ At the time of this writing, the WWTP was not decommissioned, but only allowed to treat nonhazardous waste produced in the Attleboro Corporate Campus.

²⁸⁵ See Notice of Noncompliance, *supra* note 7.

²⁸⁶ At least one commentator has argued that in order to increase agency discretion, it may be necessary to limit *ex-post* review of agency decisions. See Seidenfeld, *supra* note 33, at 455–59. Limiting that review creates the obvious problem of making agency policy vulnerable to domination by interest groups, other forms of unwarranted political influence, and idiosyncratic agency biases. See *id.* at 459–79. But the possibility of these problems alone should not bar encouraging discussion of reforming procedures to allow agencies to make decisions consistent with their policy. See *id.* at 479–95.

²⁸⁷ In fact, TI's Sensors and Controls (now Sensata Technologies) is a member of EPA's National Performance Track Program. Performance Track is a mechanism that enables voluntary partnerships between EPA and individual facilities to attain environmental results by exceeding regulatory requirements. "Performance Track is showing that many private sector New Englanders understand that doing what's good for the environment is also good for business" Press Release, EPA Region 1, Six New England Facilities Accepted Into EPA's National Performance Track Program (May 9, 2006) (quoting Robert W. Varney, regional administrator for EPA's New England Office), available at <http://epa.gov/newsroom/news-releases.htm> (follow "2006" hyperlink; then follow "Earlier Releases" hyperlink; then follow "05/09/06" hyperlink).

